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Department of Water Resources

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA ) Subcases 36-02080, 36-15127 (36-15127A  
) and 36-15127B), 36-15192, 36-15193  
Case No. 39576, ) (36-15193A and 36-15193B), 36-15194  
) (36-15194A and 36-15194B), 36-15195  
) (36-15195A and 36-15195B), 36-15196  
) (36-15196A and 36-15196B) (US/BOR)  
)  
)

MOTION TO RECONSIDER ORDER ON CHALLENGE

COMES NOW the Claimant/Objector, A & B Irrigation  
District (hereinafter "District"), by and through its attorneys  
of record, and pursuant to Rule 11(a)(2)(B) of Idaho Rules of  
Civil Procedure respectfully requests that the Court reconsider  
its Order on Challenge entered April 25, 2003. This Motion is  
supported by the pleadings, affidavits, reports, exhibits, briefs  
and transcripts on file with the court and is made upon the  
following grounds and for the following reasons, to-wit:

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RUPERT, IDAHO 83350-0396

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1. Legal conclusions have been reached by the Court which are not supported by the underlying facts and are inconsistent with established Idaho law;

2. The situation before the Court was not contemplated by the Supreme Court in Fremont-Madison v. Ground Water Appropriators, Inc., 129 Idaho 454, 926 P.2d 1301 (1996), in that this is exactly the situation wherein the use of water on enlarged or expanded acres results in a benefit to junior appropriators rather than an injury and, as such, mitigation or subordination is required; and

3. If all of the water at issue in this matter is correctly characterized only as ground water and the court concludes that injury results, the subordination date should be March 1, 1985, the enactment date of I.C. § 42-1416.

**DISCUSSION**

**A. Legal conclusions have been reached by the Court which are not supported by the underlying facts.**

1. The evidence before the Court does not support the Court's conclusion that the only source of water supplying the "B" rights is ground water originating from licensed right 36-02080.

Under the standards of summary judgment set forth in Rule 56(c), I.R.C.P. and City of Idaho Falls v. Home Indemnity Co., 126 Idaho 604, 606, 888 P.2d 383, 385 (1995), the Special

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3 Master's Recommendation that the source of water supplying the B  
4 rights is limited to ground water originating from licensed right  
5 36-02080 is incorrect. As indicated by state law and in the  
6 Court's Order, the Court must liberally construe facts and  
7 inferences contained in existing record in favor of the party  
8 opposing the motion for summary judgment. Bonds v. Sudwicks, 119  
9 Idaho 539, 554, 808 P.2d 876, 881 (1991). In reviewing all of  
10 the reasonable inferences which may be drawn from the existing  
11 record, it is clear that there are other sources which may, and  
12 in fact, do supply the "B" rights. Specifically, District's  
13 Response to Request for Admission No. 3 and Answer to Interroga-  
14 tory No. 4 at page 6 of the Responses to the Respondent's First  
15 Set of Interrogatories and Requests for Production of Documents  
16 which were included as Exhibit "B" to the Affidavit of John  
17 Marshall filed January 24, 2001 and relied upon by the Court,  
18 makes it clear that drain water may flow upon the District's  
19 project from independent sources. This water is captured by the  
20 District in its drain system and commingled with the District's  
21 drain water. This water then is used in part upon the expanded  
22 acres. The clear inference that there are other independent  
23 sources which flow into the District's system and which are  
24 commingled with the other waters of the District should clearly  
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3 prevent the Court from entering summary judgment against the  
4 District as a genuine issue of material fact exists.

5 Furthermore, the report of Brockway attached as Exhibit  
6 2 to the Affidavit of C. E. Brockway and filed with the court in  
7 opposition to the District's *Motion for Summary Judgment* also  
8 refers to other sources. Throughout the report, Brockway refers  
9 to "surface drainage" and in the conclusion of his report distin-  
10 guishes between "irrigation return flow" and "non-irrigation  
11 runoff." Brockway concludes that the proper utilization of this  
12 combined return flow and runoff on existing irrigated lands can  
13 reduce pumping from the aquifer and minimize the net depletion of  
14 the aquifer compared to other alternatives. At the very least,  
15 the underlying facts established by the record clearly indicate  
16 that a genuine issue of material fact exists and that summary  
17 judgment on this issue against the District was improper.  
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19 2. The facts and the law of the State of Idaho do not  
20 support the Court's conclusion that "the source of  
[the] 'B' rights is ground water".

21 On this issue, the Court correctly concludes that water  
22 maintains its identity as ground water until such time as the  
23 District relinquishes control of the water. Furthermore, the  
24 District agrees that this conclusion is consistent with the body  
25 of law pertaining to the reuse of recaptured waste water and the  
26 respective rights as between original and third-party appropria-  
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3 tors. The Court correctly states the general rule that waste  
4 water resulting from beneficial use of a water right may be  
5 recaptured and reused by the original appropriator of a water  
6 right so long as the recaptured waste water is put to beneficial  
7 use. Reynolds Irrig. Dist. v. Sproat, 70 Idaho 217, 214 P.2d 880  
8 (1990); Sebern v. Moore, 44 Idaho 410, 258 P. 176, 178 (1927).  
9 In addition, third parties may appropriate the waste water after  
10 it leaves the control of the original appropriator. However, the  
11 right of third-party appropriators is subject to the paramount  
12 right of the original appropriator to recapture and reuse the  
13 waste water or to later reduce the quantity of waste water  
14 through implementation of water use practices. Colthorp v.  
15 Mountain Home Irrigation District, 66 Idaho 173, 157 P.2d 1005  
16 (1945).  
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18           However, the facts in the record do not support the  
19 Court's conclusion that the District never relinquishes control  
20 of the ground water diverted under right 36-02080 and that it is  
21 never commingled with a surface source. Instead, the record  
22 clearly reflects that the District pumps water from the wells  
23 licensed under 36-02080 and delivers the water to waterusers  
24 within the District. Upon delivery of the water to the  
25 wateruser, the District relinquishes control of the water. (See  
26 the report of Brockway.) The District can only deliver a spe-

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3 cific amount. It is up to the wateruser to use what ever means  
4 they choose to put the water to beneficial use. This may include  
5 gravity irrigation or sprinkler irrigation and is out of the  
6 District's control.

7           As indicated in the report of Brockway, because of  
8 poorly defined surface drainage and closed basins, drainage  
9 systems were designed by the Bureau of Reclamation. After the  
10 water is delivered to the water user, any drain water is col-  
11 lected in this drainage system as it leave the lands of the  
12 waterusers. It is important to note that the District has no  
13 control over the amount of waste water which makes it into these  
14 drainage systems. This is important because it verifies the fact  
15 that the District relinquishes control of the ground water  
16 diverted under right 36-02080.

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18           As stated by this court, once the District has relin-  
19 quished control of the ground water, it loses its identity as  
20 ground water. Upon the District's capture of the drain water it  
21 is commingled with non-irrigation runoff. At this point, the  
22 water has clearly lost its identity as ground water and must be  
23 appropriately characterized as captured drain or waste water.  
24 Again, the District cannot control the amount of water which it  
25 receives in this fashion. Clearly, based on the underlying facts  
26 and Idaho law, the water captured in the drains, although origi-  
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3 nally ground water, must be identified as waste or drain water.  
4 Furthermore, it must be identified as an additional source to be  
5 consistent with Idaho law.

6 3. The captured drain water at issue in this matter  
7 is private water and is therefore not subject to  
8 the permit and licensing procedures applicable to  
9 waters of the state.

10 As set forth in the District's *Opening Brief in Support*  
11 *of Challenge* the drain water at issue in this matter is private  
12 water. Sebern v. Moore, 44 Idaho 410, 258 P. 176 (1927) makes  
13 it perfectly clear that where there has been no appropriation of  
14 water prior to construction of the drains in which it collects,  
15 the drain water collected "*is in the possession of the owner*" and  
16 not subject to appropriation. Clearly, the water at issue in  
17 this case is private water. As set forth in Idaho case law,  
18 water is private where it meets the statutory requirement and  
19 where the water would naturally flow into a river or stream.  
20 Olson v. Bedke, 97 Idaho 825, 555 P.2d 156 (1976). Here, the  
21 evidence is undisputed; the drainage system is ill defined and  
22 consists of closed basins which have required the use of injec-  
23 tion wells to dispose of the water. In addition, the drain water  
24 is collected solely on the property of the District. (See  
25 Affidavit of Brockway). With this in mind, there is no question  
26 that the drain water collected in the District's drains and ponds

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3 is private water and not subject to appropriation. Furthermore,  
4 because it is private water it may be put to beneficial use by  
5 the District on any lands serviced by the District, whether the  
6 lands are covered by a license or permit, or whether the lands  
7 are enlargement lands covered originally by I.C. § 42-14-16 and  
8 subsequently by I.C. § 42-1426.

9           The District has admitted that to some extent it has  
10 used ground water on expanded acres. There is no question that  
11 this falls under the amnesty statute. However, the District has  
12 also maintained that it captures drain water, which is private  
13 water located upon the lands of the District. In addition, the  
14 district has used this water on the expansion lands as well as  
15 the original lands of the District. Under Idaho law this use of  
16 the captured drain or waste water is permissible and is the very  
17 use for which the District seeks recognition. It should not be  
18 subordinated to any other right because it is a separate, private  
19 source to which no other appropriator has access. To lump this  
20 water in with the ground water of the District ignores the  
21 underlying facts and is not a correct statement of Idaho law.

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24 **B. The case before the Court is the very situation not contem-**  
25 **plated by the Supreme Court in Fremont-Madison v. Ground Water**  
26 **Appropriators, Inc., 129 Idaho 454, 926 P.2d 1301 (1996).**

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The court has reasoned that because the District did not provide a "mitigation plan" the Special Master was correct in recommending the inclusion of the subordination remark for the B rights. However, this ruling does not take into account the fact that there is no injury to be mitigated. In fact, this is the very situation which the Supreme Court in Fremont-Madison, stated it would be difficult, if not impossible, to perceive. Id. at 461. Nevertheless, the situation does exist in this case. Here the facts are such that there is no reason to provide a substituted water source as suggested by this court because the existing water users actually receive a benefit as a result of the District's use of the waste water on enlarged lands. This fact is made perfectly clear in the undisputed *Affidavit of Brockway*.

As a hypothetical, if a water shortage did occur, the District would only be required to curtail its pumping under its licence if a senior water right made a call and the call was not futile. Subordination is of no benefit to water rights junior to the District and in existence at the time the amnesty statute was passed because the district would still be allowed to divert all of the water to which it is entitled under the license. Based on the *Affidavit of Brockway*, shutting off the District's use of the drain water would actually be a detriment to those rights because use on the enlarged lands produces the greatest

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3 return to the aquifer. This fact is extremely relevant to the  
4 court's conclusions when considering whether injury is caused and  
5 whether mitigation is required.

6           Based on the facts of this case it is incorrect to  
7 conclude that "injury to junior appropriators occurs any time an  
8 enlargement claim is given priority over water rights existing as  
9 of the date of the enactment of I.C. § 42-1426, and where no  
10 mitigation plan is presented." To make this conclusion gives  
11 rise to an unintended and unconscionable result which creates a  
12 hardship on all appropriators involved and is inconsistent with  
13 the "beneficial use" doctrine of the state. Furthermore, instead  
14 of resolving the issue now while the matter is before the court,  
15 it invites future litigation relating to administration of the  
16 rights.  
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19 **C. Even if the Court is correct and all of the water at issue in**  
20 **this matter is characterized only as ground water and the court**  
21 **concludes that injury results, the subordination date should be**  
22 **March 1, 1985, the enactment date of I.C. § 42-1416.**

23           In the District's case, the date applicable to a  
24 subordination remark, to the extent such remark is appropriate,  
25 should be March 1, 1985, the enactment date of I.C. § 42-1416.  
26 The conclusion that the general rule regarding the simultaneous  
27 repeal and enactment of a statute does not apply in this case  
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does not correctly consider the law on this subject. First, while it is true that Judge Hurlbutt had declared I.C. § 42-1416 void for vagueness, the matter was on appeal to the Supreme Court at the time the legislature repealed the law and simultaneously enacted its substitute. No where does the law suggest that this constitutes an interruption which circumvents the general rule.

Where a statute is repealed by a new statute which relates to the same subject matter, and which re-enacts substantially the provisions of the earlier statute, and the repeal and re-enactment occur simultaneously, the provisions of the original statute which are re-enacted in the new statute are not interrupted in their operation by the so-called repeal . . .

73 Am. Jur 2d Statutes § 391. See also Bear Lake and River water Works and Irrigation Co. V. Garland, 164 U.S. 1 (1896)

Second, the case law cited by the District both in the Summary Judgment proceedings and the Challenge proceedings clearly indicates that the two acts only need to be substantially the same; not identical. See Bear Lake and River water Works and Irrigation Co. V. Garland, 164 U.S. 1 (1896). In fact, to insist that a repealed law and a substituted law be identical would remove any reason for the repeal and re-enactment altogether. Certainly this conclusion is not consistent with the general rule stated by the court.

Next, although it is believed that it is irrelevant for the application of the general rule, it is clear that the Dis-

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3 trict did in fact have vested rights under I.C. § 42-1416 and  
4 which should not be extinguished by the repeal and simultaneous  
5 enactment of the second statute. The facts as established by the  
6 record make this point undeniably clear. First, the District  
7 withdrew it's permit application based on the enactment of I.C. §  
8 42-1416. Second, IDWR made a report based on the District's  
9 claim under the presumption statute. No objections were ever  
10 raised to the District's claims within the time limits allowed.  
11 At that point, it can be reasonably concluded that the District  
12 obtained vested rights.

13           These rights were not extinguished by any act. The  
14 fact that Judge Hurlbutt found I.C. §42-1416 void for vagueness  
15 did not extinguish these rights. In fact, the matter was on  
16 appeal to the Supreme Court at the time the legislature repealed  
17 § 42-14-16 and simultaneously enacted § 42-1426. The appeal was  
18 dismissed as moot after the change. Nevertheless, Judge Hurlbutt  
19 could have been overtured by the Supreme Court just as he was in  
20 Fremont-Madison. In fact the Supreme Court could have made the  
21 same findings in that matter as it did in the Fremont-Madison  
22 case and the date for subordination would have remained March 1,  
23 1985. Because the District was not afforded full opportunity to  
24 pursue its rights it is only equitable and just that the date of  
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subordination, if appropriate at all, be the original enactment date.

**CONCLUSION**

For the reasons stated above, the District respectfully requests that the court reconsider the *Order on Challenge* and enter an amended order consistent with the underlying facts and the applicable case law. Oral argument is requested.

Respectfully submitted this 27th day of January, 2003.

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By:   
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Attorneys for Claim-  
ant/Objector  
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**CERTIFICATE OF MAILING**

I hereby certify that on the 01 day of May, 2003, I served true and correct copies of the **Motion to Reconsider Order on Challenge**, upon:

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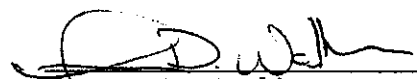
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